

Letter of Findings: 04-20110443
Gross Retail Tax
For the Years 2008 and 2009

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ISSUE

I. Sales Tax – Sales to Out-of-State Customers.

Authority: IC § 6-2.5-2-1; [45 IAC 2.2-2-1](#); [45 IAC 2.2-3-5](#); Sales Tax Information Bulletin 28S (October 2007); Sales Tax Information Bulletin 28S (February 2008).

Taxpayer protests the imposition of the sales tax on sales of vehicles to out-of-state customers.

STATEMENT OF FACTS

Taxpayer is an Indiana retailer that sells new and pre-owned vehicles. Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that, during the 2008 and 2009 tax years, Taxpayer failed to collect and remit the sales tax on several vehicles which Taxpayer sold to out-of-state customers. The Department's audit assessed Taxpayer additional sales tax and interest. Taxpayer protested the assessment. A hearing was held on the matter, and this Letter of Findings results. Additional facts will be provided as necessary.

I. Sales Tax – Sales to Out-of-State Customers.

DISCUSSION

After an audit, the Department assessed Taxpayer sales tax on the cars and SUVs ("vehicles") which it sold to out-of-state customers during the 2008 and 2009 tax years. According to the Department's auditor, the out-of-state customers arranged to have their vehicles delivered by third-party carriers. Taxpayer protested, stating that it made these out-of-state customers sign affidavits that they would pay the equivalent use tax in their home states when they registered their vehicles thus alleviating Taxpayer of the requirement to collect and remit sales tax to the Department.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Taxpayer, a dealer selling vehicles, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

[45 IAC 2.2-3-5\(c\)](#) states that:

If the vehicle is purchased from a registered Indiana motor vehicle dealer, the dealer must collect the tax and provide the purchaser a completed form ST-108 showing that the tax has been paid to him; or if the purchaser claims exemption and no tax is collected by the dealer, the certificate at the bottom of form ST-108 must be completed and signed by the purchaser. Title applications on sales by registered dealers without a form ST-108, completed by the dealer, will not be accepted. The ST-108 must be attached to the revenue copy of the title application (TA) by the license branch. Whenever a purchaser claims exemption on the reverse side of form ST-108, the dealer must retain a completed exemption certificate.

[45 IAC 2.2-3-5\(f\)](#) states that:

Exemptions from the sales tax will not be allowed except for the reasons listed on the reverse side of the revised form ST-108. (This is now ST-108E).

[45 IAC 2.2-3-5\(g\)](#) states that:

The dealer or license branch must collect sales tax in the usual manner from any purchaser claiming exemption from the sales tax for a reason other than those shown on the ST-108. The purchaser may apply for a refund of this tax from the Indiana Department of Revenue, Sales Tax Division.

Previously, there was a sales tax exemption for sales of vehicles that were immediately transported outside Indiana and title or registered in another state. However, effective July 1, 2004, the Indiana legislature repealed that exemption. IC § 6-2.5-5-15 (Repealed, P.L. 81-2004, Sec. 60). Since that repeal on July 1, 2004, Indiana sales tax applies to all motor vehicles, trailers, watercraft, or aircraft purchased in Indiana. [45 IAC 2.2-2-1](#).

Taxpayer, therefore, had a legal obligation to collect and remit the sales tax due from the out-of-state customers on the sales of the vehicles since the sales were not specifically exempted.

Furthermore, Sales Tax Information Bulletin 28S (October 2007), 20071031 Ind. Reg. 045080050NRA, and Sales Tax Information Bulletin 28S (February 2008), 20080130 Ind. Reg. 045080050NRA, states in a section that

discusses interstate commerce:

A vehicle or trailer sold in **interstate commerce** [emphasis in original] is not subject to the Indiana sales tax. To qualify as being "sold in interstate commerce" the vehicle or trailer must be physically delivered, **by the selling dealer**, to a delivery point outside Indiana. The delivery may be made by the dealer or the dealer may hire a third party carrier. Terms and method of delivery must be indicated on the sales invoice. The dealer must document terms of delivery and must keep a copy of such terms of delivery to substantiate the interstate sale.

(Emphasis added).

Pursuant to the above, if the customer is deemed to have taken possession of the vehicle in Indiana, then the purchase is subject to Indiana sales tax.

At the hearing Taxpayer asked if it could provide documentation to demonstrate that its customers in the implicated transactions had actually registered their vehicles and paid sales tax in their home states. Taxpayer asked the Department to take that information into consideration in making its final determination. The hearing officer agreed to allow Taxpayer additional time to gather that information.

Subsequently, Taxpayer submitted to the hearing officer additional documentation for consideration in making the final determination, but it was not of the sort Taxpayer described at the hearing. Instead, Taxpayer had mailed the 28 customers a letter asking them to agree entirely with a set of three statements or disagree entirely with that set of three statements (Taxpayer heard back from 15), which were:

- You took possession of the vehicle (it was delivered to you) outside the state of Indiana.
- We hired (you did not) the carrier who transported your vehicle to the location outside the State of Indiana where you took possession of the vehicle.
- You registered the vehicle and paid sales tax in the state in which you took possession of the vehicle.

First, Taxpayer never argued, prior to the hearing or at the hearing, that it was contesting the audit's statement regarding who delivered the vehicles in the implicated transactions. Second, the way the letter is worded, it was not at all clear that the customers were provided the option of agreeing or disagreeing with each individual statement; i.e., potentially agreeing to some and not to others. Third, Taxpayer asks its customers for responses using legal terms that have legal implications but does not explain the legal concepts clearly. Fourth, and most importantly, as per Sales Tax Information Bulletin 28S, in the absence of source documentation that would substantiate the necessarily self-serving nature of these Taxpayer-generated letters, the documentation Taxpayer provided does not meet Taxpayer's burden to overcome the audit's findings.

It is clear Taxpayer had a legal duty to collect sales tax on the non-exempt retail transactions in question, and to remit those taxes to the Department. Taxpayer's post-hearing documentation is not sufficient to meet the requirements expressed in Sales Tax Bulletin 28S, which requires Taxpayer to submit original documentation pertaining to delivery. Taxpayer has not met its burden of proving the proposed assessment wrong, as required by IC § 6-8.1-5-1(c).

FINDING

Taxpayer's protest is respectfully denied.

Posted: 07/25/2012 by Legislative Services Agency
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